BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	
RECALL SECURE DESTRUCTION SERVICES INC., Employer,) S,))
And)
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 227, Petitioner,)) CASE 9-RC-18280
And)
GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS LOCAL UNION 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Intervenor.))))

RECALL SECURE DESTRUCTION SERVICES, INC.'S
BRIEF IN SUPPORT OF ITS EXCEPTIONS TO HEARING OFFICER'S
REPORT ON OBJECTIONS AND RECOMMENDATIONS TO THE BOARD

TABLE OF CONTENTS

TABI	E OF A	UTHO	RITIES	iii
I.	PROC	EDURA	AL BACKGROUND	1
II.	BACK	GROU	ND ON RECALL AND MR. PENDLETON	2
III.	THE BOARD'S FINDING OF SUPERVISORY STATUS OF LEXINGTON LEAD MAN MR. RITCHIE			3
IV.	CRED	IBILIT	Y DETERMINATIONS	4
	A.		oard Should Conduct A <i>De Novo</i> Review Of The Hearing Officer's cous Credibility Findings	4
	B.	Prepor Demoi	dless Of Whether The Board Conducts A <i>De Novo</i> Or "Clear Inderance" Standard Of Review, Mr. Pendleton's Testimony Clearly Instrates That He Is A Contradictory, Self-Serving Witness Who Is Not Be Credited	7
	C.		f All Of Mr. Pendleton's Self-Serving Testimony Is Credited, His nony Alone Establishes Supervisory Status	9
V.	THE HEARING OFFICER'S FACTUAL AND LEGAL FINDINGS REGARDING MR. PENDLETON'S AUTHORITY TO ASSIGN, EFFECTIVELY RECOMMEND HIRE, RESPONSIBLY DIRECT, DISCIPLINE, SUSPEND AND EFFECTIVELY RECOMMEND REWARDS ARE ERRONEOUS AND SHOULD NOT BE ADOPTED			10
	A.	The Hearing Officer Failed To Consider Any Of The Undisputed Documentary Evidence Showing Mr. Pendleton's Consistent Supervisory Authority		
	B.	Legal	Standard	12
	C.		earing Officer's Finding Regarding Mr. Pendleton's Authority To Is Both Factually And Legally Erroneous	12
		1.	Legal Standard	12
		2.	The Evidence Clearly Establishes Mr. Pendleton's Authority To Assign Employees To A Place And Significant Overall Duties Through His Authority To Determine And Change Customer Routes.	13
		3.	The Hearing Officer's Finding That Any Authority Exercised By Mr. Pendleton To Determine And Change Employee Routes Is Not Done Using Independent Judgment Is Erroneous	15

		4.	The Hearing Officer's Factual And Legal Findings Regarding Mr. Pendleton's Authority To Assign Tasks To Temporary Employees Are Erroneous	20
		5.	The Hearing Officer's Factual And Legal Findings Regarding Mr. Pendleton's Authority To Assign Overtime Are Erroneous	20
	D.		Hearing Officer's Finding That Mr. Pendleton Does Not Have The ority To Effectively Recommend Hiring Is Erroneous	22
	E.		Hearing Officer's Finding That Mr. Pendleton Does Not Responsibly at The Louisville Employees Is Erroneous	24
		1.	Legal Standard	24
		2.	The Hearing Officer Correctly Assumed That Mr. Pendleton Directs The Louisville Employees Using Independent Judgment	25
		3.	The Hearing Officer Erred In Finding That Mr. Pendleton Is Not Held Accountable In His Direction Of The Louisville Employees	26
		4.	The Hearing Officer's Finding That Mr. Pendleton Does Not Have The Authority To Take Corrective Action When Needed Is Erroneous	27
	F.	Autho	Hearing Officer's Finding That Mr. Pendleton Does Not Have The ority To Discipline Or Effectively Recommend Discipline Is neous	28
	G.		Hearing Officer's Finding That Mr. Pendleton Does Not Have The ority To Suspend Is Erroneous	30
	H.		Hearing Officer's Finding That Mr. Pendleton Does Not Have The ority To Effectively Recommend Rewards Is Erroneous	31
	I.		ndary Indicia Further Supports Recall's Position That Mr. Pendleton Supervisor Under the Act	32
VI.	CON	CLUSI	ON	34

TABLE OF AUTHORITIES

Cases

Beverly Health & Rehabilitation Services, Inc., 335 NLRB 635 (2001)	30
Beverly Manor Convalescent Centers, 275 NLRB 943 (1985)	19
Croft Metals, Inc., 348 NLRB 717 (2006)	20, 24, 26
CTI Alaska, Inc., 326 NLRB 1121 (1998)	32
Donaldson Brothers Ready Mix, 341 NLRB 958 (2004)	12, 23
Franklin Home Health Agency, 337 NLRB 826 (2002)	30
Fred Meyer Alaska, Inc., 334 NLRB 646 (2001)	23, 28
Golden Crest Healthcare Center, 348 NLRB 727 (2006)	24
Great American Products, 312 NLRB 962 (1993)	12
Humes Electric, 263 NLRB 1238 (1982)	5
Jewel Bakery, Inc., 268 NLRB 1326, 1327 (1984)	5
Loparex LLC, 353 NLRB No. 126 (2009), enf. Loparex LLC v. NLRB, 591 F.3d 540 (7th Cir. 2009)	12, 31, 32
Mountaineer Park, Inc., 343 NLRB 1473 (2004)	28, 33
NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001)	19
North Ridge Knitting Mills, 223 NLRB 230 (1976)	5

Oakwood Healthcare, Inc., 348 NLRB 686 (2006)	5, 16, 20, 24
Ohio Masonic Home, 295 NLRB 390 (1989)	18, 19
Pepsi-Cola Co., 327 NLRB 1062 (1999)	28
Progressive Transportation Services, 340 NLRB 1044 (2003)	29, 33
Providence Hospital, 320 NLRB 717 (1996)	18, 19
Sheraton Universal Hotel, 350 NLRB 1114 (2007)	28, 33
Standard Drywall Products, Inc., 91 NRLB 544 (1950), enf'd. 188 F.2d 362 (3rd Cir. 1951)	4, 5
V&W Castings, 231 NLRB 912 (1977), enf'd. 587 F.2d 1005 (9th Cir. 1978)	5
Venture Industries, 327 NLRB 918 (1999)	23, 29, 31

I. PROCEDURAL BACKGROUND

On February 25, 2010, a Petition for Representation in Case Number 9-RC-18280 was filed by United Food and Commercial Workers Union Local 227 ("UFCW"), seeking to represent "all Louisville & Lexington drivers" of Recall Secure Destruction Services, Inc. ("Recall"). Although the Petition therefore also sought to include all Lexington drivers, following an election agreement approved by the Board on March 5, 2010, these employees were covered by a separate Representation Petition filed with the same Region in Case Number 9-RC-18285 that was dismissed by the Regional Director on April 5, 2010 after he ruled that Lexington Lead Man Carson Ritchie was a supervisor within the meaning of Section 2(11) of the Act.²

On April 2, 2010, an election was held with UFCW and the Teamsters appearing on the ballot. Three Louisville employees voted, with Recall challenging Louisville Lead Man Andrew Pendleton's vote based upon his supervisory status.³ A tally of the ballots indicated that the two counted votes were cast for the Teamsters.

On April 9, 2010, Recall filed objections to the results of the election based upon the objectionable prounion conduct of putative supervisor Mr. Pendleton. On April 16, 2010, pursuant to its obligations under Section 102.69 of the Board's Rules and Regulations, Recall supplemented its objections with a letter to the Regional Director setting forth evidence supporting a prima facie case of objectionable conduct by Mr. Pendleton. Upon finding that Recall had raised substantial and material issues of fact, the Regional Director ordered a formal

¹ There were two unions involved during the election process, the Petitioner United Food and Commercial Workers Local 227 and the Intervenor General Drivers, Warehousemen and Helpers Local Union 89, affiliated with the International Brotherhood of Teamsters ("Teamsters"). The parties worked in conjunction throughout the election process and therefore will be referred to collectively as "the Union."

² The Regional Director dismissed the petition because the bargaining unit would have consisted of only one employee.

The election eligibility list, filed March 9, 2010, lists four voters: Mr. Pendleton, Donny Corder, Fred Gupton and Victor Shoop. Mr. Shoop, however, resigned on March 29, 2010 and therefore was ineligible to vote. (Hearing Transcript ("Tr.") 274.)

hearing, which was held on May 6, 2010 before Hearing Officer Elisabeth J. Macaroni ("Hearing Officer"). During this hearing, evidence regarding both Mr. Pendleton's supervisory status and Mr. Pendleton's prounion conduct was adduced. All employees appearing on the election eligibility list received subpoenas and appeared at the hearing.

Following the hearing, all parties submitted post-hearing briefs to the Hearing Officer setting forth their positions, although they were restricted by the Hearing Officer's demand not to submit briefs that were "too long." (Tr. 316.) On June 14, 2010, the Hearing Officer issued her Report On Objections And Recommendations To The Board, finding that Recall failed to establish that Mr. Pendleton is a supervisor within Section 2(11) of the Act, and that consequently his prounion conduct did not interfere with the Louisville employees' freedom of choice so as to interfere with or materially affect the outcome of the election. After receiving an extension from the Board, on July 6, 2010, Recall filed its exceptions to the Hearing Officer's recommendations and this brief in support of such exceptions.

II. BACKGROUND ON RECALL AND MR. PENDLETON

Recall is a secured document destruction company. (Tr. 12.) Recall's Louisville facility is part of Recall Secure Destruction Services, which handles confidential material from clients by picking up the material, bringing the material back to Recall facilities and destroying the material in a confidential and secure manner. (*Id.*) Jody Schunder, Area Operations Manager for Ohio and Kentucky for Recall since November 2006, oversees four Recall facilities in his capacity as Operations Manager for Ohio and Kentucky, including Recall's Lexington and Louisville facilities. (Tr. 11-12.) Mr. Schunder's primary office is located in Cincinnati, Ohio. (Tr. 12.)

Since December 2006, Mr. Pendleton has served as Louisville Team Lead. (Tr. 14-15; Employer's Exhibit ("ER Ex.") 1.) As Louisville Team Lead, Mr. Pendleton is in charge of the

⁴ Page citations To Report On Objections and Recommendations To The Board hereinafter referenced as "P. __."

day-to-day operations at the Louisville facility, taking "ownership of the operations" in ensuring driver routes are completed, scheduling routes, addressing customer requests and issues and ensuring that the facility operates in a safe manner. (Tr. 14, 19.) As such, Mr. Pendleton serves as "an on-site management personnel" and is the only management personnel located at the Louisville facility. (Tr. 16, 19.) Although he also performs work as a driver from time to time, Mr. Pendleton is still responsible for supervision of the Louisville operations at all times, including supervising the other employees. (Tr. 19, 23-24.)⁵ Thus, even when Mr. Pendleton is traveling for work, he is responsible for the operations of the Louisville facility and is generally able to accomplish many of his supervisory tasks by using a cell phone. (Tr. 24.)

III. THE BOARD'S FINDING OF SUPERVISORY STATUS OF LEXINGTON LEAD MAN MR. RITCHIE

As noted, the Petition for Representation initially filed by UFCW in Case Number 9-RC-18280 initially sought to represent "all Louisville & Lexington drivers" at Recall. Ultimately, following an election agreement approved by the Board on March 5, 2010, the Lexington employees were covered by a separate Representation Petition filed in Case Number 9-RC-18285. On March 24, 2010, a hearing before Hearing Officer Aranzazu Lattanzio was conducted for the purpose of determining the supervisory status of Lexington Lead Man Mr. Ritchie.⁶ After both Recall and the Union briefed the issue, on April 5, 2010 the Regional Director ruled that Mr. Ritchie was a supervisor within the meaning of Section 2(11) of the Act. The Union's request for review of this decision was denied by the Board on June 17, 2010 after it found that the Union's request for review raised no substantial issues warranting review.

The Hearing Officer's report correctly recognizes that Mr. Schunder serves as Area Operations Manager for both the Louisville and Lexington facilities. (P. 4.) Mr. Schunder's

⁵ The drivers at Recall's facilities are referred to as "Security Service Representatives" or SSRs. (Tr. 92.)

⁶ All parties were represented at this hearing.

uncontroverted testimony is that Mr. Pendleton serves in the same role as Mr. Ritchie and that he has the same duties and responsibilities as Mr. Ritchie. (Tr. 15.) The Hearing Officer's report regarding Mr. Pendleton's supervisory status was issued June 14, 2010, three days *before* the Board rejected the Union's request for review of the Regional Director's ruling that Mr. Ritchie constitutes a supervisor within the Act. Thus, the Hearing Officer's recommendation now stands in direct contravention of an order by her own Regional Director that was also approved by the Board. Accordingly, the Hearing Officer's recommendation should be rejected as contrary to the facts and law but also as inconsistent with the rulings of the Board on a nearly identical record.

IV. CREDIBILITY DETERMINATIONS

A. The Board Should Conduct A *De Novo* Review Of The Hearing Officer's Erroneous Credibility Findings

In her report, the Hearing Officer erroneously credited Mr. Pendleton's blatantly self-serving testimony over Mr. Schunder's "forthright" testimony when considering Mr. Pendleton's job duties. (P. 13.)⁷ One of the difficulties for a party who receives adverse recommendations by a Hearing Officer in excepting to the recommendations before the Board is the Board's rote deference to the credibility determinations of the Hearing Officer (formerly called trial examiners) pursuant to *Standard Drywall Products, Inc.*, 91 NRLB 544 (1950), *enf'd*. 188 F.2d 362 (3rd Cir. 1951). It is well established, however, that it is the Board, not the ALJ, that has responsibility for determining the facts:

In all cases, save only where there are no exceptions to the Trial Examiner's proposed report and recommended order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence. Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings. Nevertheless, as the demeanor of witnesses is a factor of consequence in resolving issues of credibility, and as the trial examiner, but not

⁷ The Hearing Officer generally credited Mr. Schunder's testimony unless it conflicted with a Louisville employee's testimony or "where documents were available to substantiate his testimony but were not produced." (P. 13.)

the Board, has had the advantage of observing the witnesses while they testified, it is our policy to attach great weight to a Trial Examiner's credibility findings insofar as they are based on demeanor. Hence, we do not overrule a Trial Examiner's resolutions as to credibility except where the clear preponderance of all the relevant evidence convinces us that the trial examiner's resolution was incorrect.

Id. at 544-545 (footnotes excluded) (emphasis added).

Thus, with the exception of credibility determinations based principally on the Hearing Officer's observation of a witness' demeanor, the Hearing Officer's recommendations (including credibility determinations) are not binding on the Board and are subject to a *de novo* review of the entire record. As the Board explained in *Jewel Bakery, Inc.*, 268 NLRB 1326, 1327 (1984), "the 'ultimate choice between conflicting testimony rests not only on the witnesses' demeanor but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.'" (*citing Humes Electric*, 263 NLRB 1238 (1982); *V&W Castings*, 231 NLRB 912 (1977), *enf'd*. 587 F.2d 1005 (9th Cir. 1978); *North Ridge Knitting Mills*, 223 NLRB 230 (1976)). "In cases in which the excepted-to credibility resolutions are in decisions which have omitted reference to relevant testimony on critical matters and have mistakenly characterized the state of the record, the Board has accorded less weight to the factor of demeanor. Thus, the invocation of the demeanor factor is not a substitute for a complete review and analysis of all the record evidence." *Id*.

In *Jewel Bakery*, the Board reversed the ALJ's credibility findings on the grounds that "the judge's decision omitted reference to relevant testimony on critical matters; and no reasons were set forth for ignoring such testimony" and because the ALJ's "conclusions were based on testimony which was not placed within context ... [and] the decision contained statements and findings unsupported by the record evidence." *Id.* This is precisely what the Hearing Officer has done in the instant case. Here, the Hearing Officer almost completely ignored the exhibits showing Mr. Pendleton's supervisory authority, frequently stated that "no evidence" exists on

various issues when such evidence does exist and then selectively relied upon Mr. Pendleton's highly motivated and inconsistent testimony to make her findings. Based on a fair review of the record, the Hearing Officer obviously did not base her witness credibility findings on her observation of witness demeanor. Indeed, if the Hearing Officer had actually based her credibility findings on the witnesses' demeanor, she would have recommended that Mr. Pendleton's self-serving testimony *not* be credited. In her report, the Hearing Officer noted that Mr. Pendleton was defensive and "had a tendency to qualify his testimony in regard to his job responsibilities by continually asserting that any of the other SSRs could do his job." (P. 13.) Such an observation should operate *against* a finding that Mr. Pendleton's testimony was truthful, but at the very least fails to support the Hearing Officer's finding.

In support of her finding to credit Mr. Pendleton's testimony, the Hearing Officer noted that when Mr. Pendleton described his duties, "he did not 'choose his words' as carefully as a witness would who was trying to hide something." (*Id.*) The Hearing Officer's unfounded assumption that someone who aggressively asserts his position is necessarily truthful is particularly erroneous in the present circumstances given Mr. Pendleton's behavior on the witness stand, in which he constantly interrupted Recall's counsel, provided evasive answers and backtracked on testimony regarding his job duties. (*See, e.g.*, Tr. 164-67, 170-76, 179-80, 191, 195, 197, 205, 221-22, 230-32). When such testimony is viewed in light of Mr. Pendleton's understanding that his participation in the Union turns on the issues he testified about and his statement that he wants the Union "better, or worse than ever" (Tr. 252), the Hearing Officer's ruling that Mr. Pendleton was a truthful witness is dubious at best.

Meanwhile, the Hearing Officer found that Mr. Schunder testified in a "forthright manner," and her report did not otherwise address his demeanor. (P. 13.) Thus, her finding that Mr. Schunder's "forthright" testimony should nevertheless be discredited in favor of

Mr. Pendleton's self-serving and inconsistent testimony is *unsupported* by her own observations and her "credibility" determinations are entitled to no deference.

Moreover, the Hearing Officer's report omitted relevant testimony and exhibits on critical matters, provided little if any reasoning for ignoring such testimony and exhibits and contained findings that are not supported by the record and are based on testimony that has been taken out of context. Accordingly, the Hearing Officer's credibility findings are not entitled to deference by the Board and must be reviewed *de novo* based on the entire record.

B. Regardless Of Whether The Board Conducts A De Novo Or "Clear Preponderance" Standard Of Review, Mr. Pendleton's Testimony Clearly Demonstrates That He Is A Contradictory, Self-Serving Witness Who Should Not Be Credited

Mr. Pendleton testified at the hearing that his "values have changed drastically towards the thought of a union" in that he "want[s] them better, or worse than ever." (Tr. 252.) Mr. Pendleton's contradictory, evasive and wavering testimony should thus be viewed in this light, and any testimony by him attempting to distance himself from supervisory status should be rejected as blatantly self-serving. Thus, for instance, when asked if he has a duty to investigate an employee injury in his role as Team Lead, Mr. Pendleton testified unequivocally that "I never have ... I've never went out and investigated where [the employees] did their business, or how exactly [the injury] happened." (Tr. 230.) Yet upon being shown a copy of an injury investigation report he completed less than a year ago for an injury suffered by Mr. Gupton, Mr. Pendleton admitted he prepared the document, which provides an accident description outlining how the injury occurred. (Tr. 230-31; ER Ex. 20.)

Indeed, Mr. Pendleton was caught in several direct contradictions during the hearing, which show that *all* of his testimony is unreliable and unworthy of belief. For example, Mr. Pendleton adamantly denied that he had any contact with the Union prior to the employees' first Saturday meeting at the Union hall, yet later admitted that he had a phone conversation with

UFCW Representative Harold Embry prior to this meeting, but only after being confronted with his own notes while on the witness stand. (Tr. 234, 254-56; ER Ex. 21.) Further, Mr. Pendleton's testimony that if he ever had a conversation with a Union representative, it was "very unmemorable" should be called into question by Mr. Pendleton's subsequent admission regarding his own detailed notes about the Union that "I can't imagine that I got all of this from -- from memory." (Tr. 236-37, 256-57; ER Ex. 21.)

Moreover, when asked about a 202-area code phone number (Mr. Embry's cell phone number), Mr. Pendleton initially testified that he had "no idea" about whose number this was, that he did not think he "would call an out-of-town number" and that he does not "even answer out-of-town phone numbers very often." (Tr. 253.) Yet this number appeared multiple times in his Company phone records, and when directly asked Mr. Pendleton was able to quickly identify the number in his personal cell phone as the Union representative's cell phone number. (Tr. 256; ER Exs. 21-22.) Mr. Pendleton's credibility is further called into question by his testimony that he "really [doesn't] know" whether he continued to communicate with either Union after the initial Saturday meeting, when Company phone records indicate that he was in regular contact with Mr. Embry during the critical period. (Tr. 251, 255; ER Exs. 21-22.) Indeed, after claiming he did not know if he communicated with either Union after the initial meeting, Mr. Pendleton reluctantly admitted that he "talked" with Union officials during the election period. (Tr. 252.)

Mr. Pendleton also claimed that he "wasn't in really support of the Union" during the employees' first meeting with the Union. (Tr. 249-50.) Yet, this claim is rebutted by the testimony of Mr. Shoop, who testified that Mr. Pendleton was vocal about his support of the Union at this meeting (Tr. 280),⁸ and Mr. Gupton, who testified that Mr. Pendleton was present during the discussion about wanting a Union. (Tr. 303-04.) Upon follow-up questioning at the

⁸ Mr. Shoop, as an individual no longer working for Recall, does not have a motivation to slant his testimony like Mr. Pendleton, and thus, his testimony should be credited over Mr. Pendleton's in this regard.

hearing, Mr. Pendleton recanted his testimony that he was not in support of the Union during this meeting. (Tr. 250.) These clear contradictions, when considered in the context of how "bad" he wants the Union, dictate that Mr. Pendleton's testimony regarding his job duties should be discredited as self-serving. Likewise, when testifying about his job duties, Mr. Pendleton repeatedly made admissions showing his supervisory status but then would make self-serving statements in an effort to minimize or recant such admissions. (*See* TR 165-65, 167, 169, 172-73, 182-83, 191-92, 194-213, 225-28, 230-33.)

Mr. Pendleton's view on the permissibility of providing self-serving, false information before governmental bodies is best articulated by his own testimony. When asked why he wrote his job title as "Supervisor" on a report filed with the Indiana State Police (ER Ex. 15), Mr. Pendleton responded, "I mean, if I want to sound better to the right -- to the right party, if it gets me out of any kind of other ramifications, then, yeah, I'm the boss, I'm the supervisor, I'm the vice president, whatever it takes." (Tr. 204-05 (emphasis added).) Here, Mr. Pendleton "did whatever it takes," to avoid being found a supervisor, and his testimony should be viewed in this light.

C. <u>Even If All Of Mr. Pendleton's Self-Serving Testimony Is Credited, His Testimony Alone Establishes Supervisory Status</u>

Despite the Hearing Officer's unwarranted crediting of *all* of Mr. Pendleton's self-serving testimony in the face of numerous contradictions, defensive responses and unsupported statements, as demonstrated below, Mr. Pendleton's own credited statements clearly establish his supervisory authority regarding several supervisory functions.

V. THE HEARING OFFICER'S FACTUAL AND LEGAL FINDINGS REGARDING MR. PENDLETON'S AUTHORITY TO ASSIGN, EFFECTIVELY RECOMMEND HIRE, RESPONSIBLY DIRECT, DISCIPLINE, SUSPEND AND EFFECTIVELY RECOMMEND REWARDS ARE ERRONEOUS AND SHOULD NOT BE ADOPTED

A. The Hearing Officer Failed To Consider Any Of The Undisputed Documentary Evidence Showing Mr. Pendleton's Consistent Supervisory Authority

Throughout her report, the Hearing Officer attempted to discount the substantial evidence adduced demonstrating that Mr. Pendleton exercises supervisory authority by asserting that the exercise of such authority was rare or sporadic. One particularly glaring error the Hearing Officer made in issuing her report was her failure to even consider the undisputed documented evidence presented and admitted as exhibits at the hearing. This documentary evidence alone establishes Mr. Pendleton's consistent exercise of supervisor authority both well-before and after the election period:⁹

- September 24, 2008 Mr. Pendleton decided on his own, without consulting Mr. Schunder, on how to implement the scheduling at the Louisville facility of a special project for one of Recall's national customers and carried out at several locations. As Mr. Schunder testified, this document serves merely as an example where Mr. Pendleton has had to implement new business, which occurs on a "frequent basis." (Tr. 42-44; ER Ex. 4.)
- **January 28, 2009** Mr. Pendleton has the authority to cancel work for himself and all Louisville employees due to inclement weather or other conditions without seeking Mr. Schunder's approval, and he exercised this authority on this workday. (Tr. 58-59; ER 10.)
- March 31-April 3, 2009 As part of his responsibility for ensuring that Louisville employees attend training and maintaining documentation of their taking the training, Mr. Pendleton facilitated the week-long training of all Louisville employees, including specifically documenting the day that Mr. Gupton attended the first training session since Mr. Gupton was absent when it was first given. Mr. Pendleton's own documentation reflected that he was the "manager" facilitating such training. (Tr. 68-69; ER Ex. 11.)
- **April 30, 2009-February 2, 2010** Mr. Pendleton took detailed notes regarding Mr. Gupton's job performance as part of his plan to discipline Mr. Gupton, including counseling Mr. Gupton about his tardiness. (Tr. 208-14; ER Ex. 16.)¹⁰

¹⁰ But for Mr. Pendleton's admitted destruction of a written warming form shortly before the hearing (Tr. 144, 192), Recall could have produced additional documentation of Mr. Pendleton's supervisory authority. Mr. Pendleton's destruction of this document should result in an adverse inference against Mr. Pendleton.

⁹ The undisputed evidence establishes that these exhibits are merely illustrative examples of the types of authority consistently exercised by Mr. Pendleton as Louisville Team Lead.

- **July 15, 2009** Mr. Pendleton, in response to Mr. Gupton telling him that a rock hit the windshield of his truck, arranged for the windshield to be repaired without seeking Mr. Schunder's approval. (Tr. 78; ER Ex. 12.)
- **September 1, 2009** Mr. Pendleton conducted an injury investigation of Mr. Gupton after Mr. Gupton suffered an injury on the job. (Tr. 230-33; ER Ex. 20.) As part of his authority, Mr. Pendleton ordered Mr. Gupton to: (a) take a drug and alcohol test; (b) wear an arm brace for a period of time; (c) perform only "light-duty" tasks; and (d) complete stretching exercises every morning. (*Id*.)
- October 6, 2009 Mr. Pendleton decided on his own, without consulting Mr. Schunder, how to assign new customer business out of the Louisville facilities into the existing employee routes and schedules. As Mr. Schunder testified, the exhibit presented serves merely an example of Mr. Pendleton's authority in this regard. (Tr. 39-41, 44; ER Ex. 3.)
- October 17-19, 2009 Mr. Pendleton decided on his own, without Mr. Schunder's approval, to make service changes, to have Mr. Gupton's truck repaired and that he and Mr. Corder would work overtime on Saturday. (Tr. 81-85; ER Ex. 14.)
- October 2009 Mr. Pendleton received a schedule from Mr. Gupton of physical therapy appointments scheduled during the workday, which Mr. Pendleton accordingly addressed. (Tr. 216-18; ER 17.) Mr. Pendleton testified that he decides how to reschedule his and other employees' schedules as a result of such appointments. (Tr. 216-17.)
- **November 4, 2009** On his own accord, Mr. Pendleton listed his title as "Supervisor" on an official document filed with the Indiana State Police. (Tr. 204-05; ER Ex. 15.)
- **January 13, 2010** On his own, Mr. Pendleton assigned a temporary employee tasks for the workday by preparing a written list. (Tr. 221-23; ER Ex. 18.)
- **January 19, 2010** Mr. Pendleton made the decision on his own to make an extra trip to a client's worksite in order to skip serving the client on the following day so that the Louisville drivers could service other clients. (Tr. 54-55; ER Ex. 8.)
- February 22, 2010 Mr. Pendleton, in conjunction with Mr. Ritchie, and without Mr. Schunder's input or approval, permanently moved an entire day's worth of work from the Lexington operation to the Louisville operation. (Tr. 56-57; ER Ex. 9.) This decision made by two Team Leads effectively reduced the workload of the Lexington facility by one day's worth of work and increased the workload of the Louisville facility by one day's worth of work.
- **February 22, 2010** Mr. Pendleton decided on his own to rent a rental truck "probably 1 time a week until March 1st" in order to catch up on services so that the facility could achieve a "perfect order," a performance matrix that is tracked for the entire Louisville facility. (Tr. 79-81; ER Ex. 13.)
- April 6, 2010 Mr. Pendleton made the decision to reschedule several customer pickups for two separate driver routes for the next two workdays, without consulting Mr. Schunder. (Tr. 50-53; ER Exs. 6-7.) Mr. Pendleton's rescheduling of the work impacts one of the driver's schedules by creating more work for the driver the following day. (*Id.*) Mr. Pendleton does not consult Mr. Schunder regarding which routes the rescheduled customer services should go on, which day they should go on or who should perform the work. (Tr. 50-53.)
- April 14, 2010 Mr. Pendleton made the decision to reschedule several customer pickups on a particular driver route for the next day, without consulting Mr. Schunder.

Mr. Pendleton does not consult Mr. Schunder before rescheduling a driver route. (Tr. 45-46; ER Ex. 5.)

B. <u>Legal Standard</u>

An individual constitutes a supervisor under Section 2(11) of the Act if: (1) he holds the authority to engage in any 1 of the 12 supervisory functions; (2) his exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and (3) his authority is held in the interest of the employer. 11 Loparex LLC, 353 NLRB No. 126 (2009), enf. Loparex LLC v. NLRB, 591 F.3d 540 (7th Cir. 2009) (emphasis added). "An individual need possess the authority to perform only one of the enumerated functions to qualify to meet the statutory definition." Donaldson Brothers Ready Mix, 341 NLRB 958, 962 (2004) (citing Great American Products, 312 NLRB 962 (1993)). Furthermore, "(s)upervisory status may be shown if the putative supervisor has the authority to either perform a supervisory function or to effectively recommend the same." Oakwood Healthcare, Inc., 348 NLRB 686, 687 (2006). In order for a putative supervisor to satisfy Section 2(11)'s "independent judgment" requirement, he must act or effectively recommend action "free of control of others and form an opinion or evaluation by discerning and comparing data"; furthermore, such judgment must rise above the "routine or clerical." Id. at 693. The undisputed evidence clearly establishes that Mr. Pendleton constitutes a supervisor, as he exercises several types of supervisory authority set forth in Section 2(11) (each independently sufficient) with the requisite independent judgment.

C. <u>The Hearing Officer's Finding Regarding Mr. Pendleton's Authority To Assign Is Both Factually And Legally Erroneous</u>

1. Legal Standard

In *Oakwood Healthcare*, the Board defined the term "assign" as referring "to the act of designating an employee to a place (such as a location, department, or wing), appointing an

¹¹ Clearly, Mr. Pendleton undertakes his duties in the interest of the employer, as Mr. Schunder's testimony demonstrates his duties advance Recall's business. Indeed, the Hearing Officer's report apparently assumed this fact, as she did not address this issue. Moreover, this issue was not disputed by the Union.

employee to a time (such as a shift or overtime period), or giving significant overall duties, *i.e.*, tasks, to an employee." 348 NLRB at 689.¹² In defining "independent judgment" in the context of "assign" supervisory task, the Board has explained "that '[t]he authority to effect an assignment ... must be independent [free of the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine' or 'clerical.'" *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006) (quoting *Oakwood Healthcare*, 348 NLRB at 693).

2. The Evidence Clearly Establishes Mr. Pendleton's Authority To Assign Employees To A Place And Significant Overall Duties Through His Authority To Determine And Change Customer Routes

Recall presented substantial evidence that Mr. Pendleton assigns the other Louisville employees to a location and gives them significant tasks through the actions he takes in assigning them to service customer facilities based upon the driver routes he makes and changes on his own. (Tr. 24-27, 38-46, 50-57, 221-23; ER Exs. 3-9, 18.) In analyzing the evidence adduced at the hearing regarding Mr. Pendleton's authority to assign the Louisville employees these customer routes, the Hearing Officer made numerous errors.¹³

Mr. Schunder's unrebutted testimony is that Mr. Pendleton determines which routes the Louisville drivers drive each day: "Andy will tell the other drivers what truck or -- what route to be running and what truck to take." (Tr. 25-26.)¹⁴ As such, Mr. Pendleton testified that he also determines which routes he drives. (Tr. 174.) Mr. Pendleton assigns significant overall duties to

¹² Because the *Oakwood Healthcare* Board used the disjunctive ("or") in describing the necessary actions to establish the "assign" responsibility under Section 2(11), Recall need only show that Mr. Pendleton satisfy one of the categories of acts listed. Recall can establish all three categories of acts set forth by the Board, however.

The Hearing Officer unnecessarily "bifurcated" her analysis of Mr. Pendleton's authority to assign the employees customer routes based upon: (a) his authority to make an "initial assignment" of routes; and (b) his authority to switch, change and add to routes based upon customer, manpower and equipment needs. Regardless, the unrefuted evidence indicates that Mr. Pendleton has and exercises the authority to assign the Louisville employees driver routes, which affect both the location of their employment and operate as an assignment of significant overall duties.

¹⁴ Mr. Schunder's credited testimony also indicates that Mr. Pendleton has the authority to require the Louisville employees to follow the schedule he sets for them. (Tr. 30.)

the Louisville employees through the important actions he takes in determining customer routes, including permanently changing routes, temporarily rescheduling routes and adding new routes when a new customer or project has been added. (Tr. 24-27, 39-46, 50-55; ER Exs. 3-8.) Despite this unrefuted evidence, the Hearing Officer opined that without specific evidence regarding the assignment of handhelds to the employees, "it is impossible to conclude that Pendleton either assigns routes or uses independent judgment when doing so." (P. 16.) The testimony is clear, however, that *Mr. Pendleton* assigns the routes by inputting the changes into the Company's Care System, while the handheld device functions as a "portable list" of the customer routes. (Tr. 38, 45, 56; ER Exs. 5-7, 9.) Moreover, Mr. Pendleton's own credited testimony establishes that he assigns the routes through the important actions he takes, including: (a) changing routes; (b) adding stops to routes for new business or customers; (c) compensating for lost business or customers; and (d) rescheduling stops. (Tr. 163-75.)¹⁵

As one example of Mr. Pendleton's authority to assign routes, Mr. Pendleton testified that he reassigned Mr. Gupton from driving his preferred route of driving the Company's shred truck every day "(b)ecause [the route distribution] needs to be equal" and that, in his view, assigning Mr. Gupton to the shred truck route nonstop would be unfair to the other employees. (Tr. 179-80.)¹⁶ Mr. Pendleton's admitted concern for and determination of what were "equal" or "fair" route assignments are clear examples of supervisory decision making and authority. Moreover, Mr. Gupton's testimony indicates that Mr. Pendleton assigns his routes, as he testified that Mr. Pendleton changed his route so that he began driving a hospital run rather than the shred

¹⁵ Although Mr. Pendleton attempted many times in his testimony to downplay his role in assigning routes, including making the self-serving and uncorroborated statement that new customers are rarely added, he admitted that he has rescheduled routes "plenty of times." (Tr. 172.)

¹⁶ Mr. Pendleton attempted to avoid this line of questioning at the hearing, responding to Recall counsel's question about which Louisville employee prefers to drive the shred truck route nonstop by asking, "(d)oes that matter?" (Tr. 179.)

truck run on Tuesdays. (Tr. 310.)¹⁷ Yet the Hearing Officer failed to consider any of this evidence in her report.

Recall also presented unrefuted evidence that Mr. Pendleton assigns routes to temporary employees, including a written directive from Mr. Pendleton assigning a temporary employee to a particular route and customer stops for the workday. (Tr. 37-38; ER Ex. 18.)¹⁸ Despite this credited evidence, the Hearing Officer inexplicitly found that Mr. Pendleton merely "gives temporary employees handhelds and tells them to 'go out and get as much as you can get done.'" (P. 16.)

Thus, the evidence is clear that Mr. Pendleton assigns employees to a location and significant overall tasks through the actions he takes in assigning routes.

3. The Hearing Officer's Finding That Any Authority Exercised By Mr. Pendleton To Determine And Change Employee Routes Is Not Done Using Independent Judgment Is Erroneous

a. The Hearing Officer's Findings

Despite her suggestions that Recall failed to present evidence that Mr. Pendleton has the authority to assign employees tasks and to a particular location through his assignment and changing of service stops, the Hearing Officer nevertheless seemed to recognize that the unrebutted testimony from the witnesses demonstrates that Mr. Pendleton has the authority to assign employee tasks and to a particular location through his ability to create and establish routes¹⁹ and thus found against Recall on the basis that Mr. Pendleton does not exercise

¹⁷ In support of her finding that Mr. Pendleton does not make the initial assignments of routes to the SSRs, the Hearing Officer stated that "there was no testimony that Pendleton ever assigned warehouse work to the SSRs." (P. 16.) Mr. Pendleton testified, however, that he determines how much warehouse work he completes versus driving in the truck, which has a direct effect on how much time the employees spend in the warehouse, and that a driver with fewer stops works more in the warehouse. (Tr. 171, 174.) Regardless, this finding does not dilute the evidence presented regarding assignment of driver routes, of which the employees spend most of their time. (Tr. 162.)

¹⁸ Mr. Pendleton testified that he currently has two temporaries at his jobsite. (Tr. 218.)

¹⁹ The Hearing Officer's report also credited evidence that Mr. Pendleton switches service stops among the SSRs and temporarily adjusts and reschedules routes but, citing *Croft Metals*, found that these routes do not constitute "assignment" under the definition set forth by the Board in *Oakwood Healthcare*. (P. 17.) The Hearing Officer

independent judgment in assigning work.²⁰ In support of her finding that Mr. Pendleton's duties in creating and establishing routes are not conducted using "independent judgment," the Hearing Officer claimed that the evidence shows that Mr. Pendleton does nothing more with new customers or business than fit them into existing routes based upon customer contracts and Mr. Schunder's instructions to be efficient. (P. 17.) In this regard, the Hearing Officer found significant Mr. Pendleton's testimony that driver routes are optimized by someone other than the team leaders according to their geographic locations every two to three years. (Id.) Furthermore, although she acknowledged that Mr. Pendleton reassigned Mr. Gupton from the shred truck route to a hospital route on Tuesdays in order to equally and "fairly" distribute the hospital and shred truck work among the SSRs, she nevertheless found that this decision was not undertaken with independent judgment. (P. 16-17.)

b. The Hearing Officer Failed To Credit All The Factors Mr. Pendleton Considers When Assigning Routes

As noted, the Hearing Officer summarily determined that no independent judgment is required based on her conclusory statement that the terms of customer contracts and an "efficiency" guideline reduce Mr. Pendleton's decisions to routine or clerical in nature. This superficial analysis ignored the substantial record evidence to the contrary and the complexity associated with the determinations of employee work and route assignments. Indeed, the evidence shows that the decision to reschedule stops and assign or change routes is based on a

misapplies Croft Metals. In Croft Metals, the Board considered the supervisory issue in the context of lead men that the Board found only "sporadically" assign employees tasks when an employee is absent such that they "have no choice or flexibility concerning the personnel, if any, assigned to them." 348 NLRB at 721. Here, the evidence demonstrates that Mr. Pendleton does not sporadically assign employees tasks, but rather makes this determination every day, and exercises flexibility in assigning employees to a location and duties such as when he removed Mr. Gupton from the shred truck route on Tuesdays to a hospital route on his own. (Tr. 179-80.) In any event, the Hearing Officer recognized that Mr. Pendleton has the authority to create and establish routes, which constitute both assigning an employee to a place and giving an employee significant overall duties, i.e. tasks. (P. 17.) Oakwood Healthcare, 348 NLRB at 689.

²⁰ For instance, the Hearing Officer attempted to discount Recall's undisputed evidence that Mr. Pendleton creates and changes routes by arguing that such activities are not assignment per se and therefore not indicative of supervisory status, but nevertheless "recogniz(ed) that creating and establishing routes can be an integral part of assigning the routes." (P. 17.)

"cascade" of factors which must be assessed in combination with the overall operations of the facility *on a daily basis*. For example, it is undisputed that Mr. Pendleton makes changes to routes based on workloads, employee absences, vacations, medical restrictions, changes in customer requirements, special projects, the addition of customers, the loss of customers and the reallocation of work between facilities.²¹ (Tr. 24-27, 35-36, 39-46, 50-55, 175-76, 202-03; ER Exs. 3-8.) When Mr. Pendleton makes such decisions, he has to consider among other factors:

- (1) whether the customer can or is willing to accept a rescheduling of service;
- (2) the capacity of other drivers or routes to take on additional stops and whether the reassignment would result in overtime;
- (3) whether the reassignment of stops would create inefficient operations;
- (4) whether the proper equipment is available when needed; and
- (5) the impact of route changes on the facility's ability to achieve "perfect order" status.

(Tr. 26-27, 34-35, 83, 147, 149, 165-67.)

This logistics planning process is not a simple clerical exercise as apparently assumed by the Hearing Officer. For example, when special projects or reassignment or rescheduling occurs due to unplanned absences, vacations, medical restrictions, special customer request -- all of which occur frequently -- Mr. Pendleton must look at the geographic location of the customer stops and determine if an existing route will put a Recall truck in the area at the frequency and pick-up times required by the customer. (Tr. 26-27, 166.) If not, then other routes and schedules may have to be modified to accommodate other customer's needs while still satisfying the required service levels of other customers. (Tr. 34-36, 51-55.) However, having a Recall truck in the area at the required frequency and times is not the end of the analysis because the truck

²¹ The Hearing Officer disregarded the frequency of such changes by isolating such incidents and thereby ignoring the consistent and frequent changes made by Mr. Pendleton to routes which have a direct impact on employee work lives and earning capacity under the Pay For Performance Program.

and equipment must be appropriate for the customer's needs. (Tr. 148.) Thus, even if a Recall truck is scheduled to be in the area at the required frequency and times, that Recall truck may not have sufficient capacity to pick up additional customer materials and/or the equipment or bins needed to service the customer. If the truck does not have the needed capacity or equipment, then Mr. Pendleton will be required to re-route the necessary truck and equipment which necessarily will have a "domino effect" on other routes and customers and could require an overall change in routes and schedules. Of course, in making such determinations, Mr. Pendleton must consider the working hours and availability of the Louisville drivers, the potential for overtime, the potential for "missed stops" which negatively impacts customer service and the facility's perfect order scores. (Tr. 83, 165-67.) This evidence shows that Mr. Pendleton assigns work using independent judgment and the Hearing Officer's findings to the contrary are refuted by the record.²²

c. The Hearing Officer Erroneously Dismissed Credited Example Evidence Showing That Mr. Pendleton Assigned Mr. Gupton Work Using Independent Judgment

As an example of his ability to assign work to employees using independent judgment, the credited testimony by Mr. Pendleton and Mr. Schunder demonstrates that Mr. Pendleton, on his own and without Mr. Schunder's input, removed Mr. Gupton from the shred truck route on Tuesdays and assigned him to service a hospital client in order to equally distribute the hospital and shred truck work among the SSRs to make it "fair." (Tr. 28-30, 179-80; P. 16.) The Hearing Officer ruled, however, that Mr. Pendleton did not use "independent judgment" when making that assignment, citing the Board's decisions in *Ohio Masonic Home*, 295 NLRB 390, 395 (1989) and *Providence Hospital*, 320 NLRB 717, 727 (1996). (P. 16-17.)

²² Recall must also show that Mr. Pendleton's judgment on assigning the routes is "free of the control of others." *Croft Metals, Inc.*, 348 NLRB at 721. This is easily established, as Mr. Schunder's credited testimony is that Mr. Pendleton's exercise of discretion in establishing and creating routes is completed without his input (Tr. 26-27, 147-48), and there was no evidence presented to the contrary.

There are several problems with the Hearing Officer's reliance on these decisions. First, these decisions addressed the supervisory status of charge nurses before the Supreme Court issued its decision in NLRB v. Kentucky River Community Care, Inc., 532 U.S. 706 (2001), in which the Supreme Court ruled that the Board had used an unduly restrictive interpretation of "independent judgment" in the context of charge nurses.²³ In addition, the Board's decision in Ohio Masonic Home turned on its finding that the nurses in question directed the employees "in connection with the treatment of patients to ensure that quality care is provided to all residents in their care units" and that no evidence was presented suggesting "that the charge nurses' direction of employees work goes beyond into 'personnel authority which more directly promotes the interests of the Employer and is not motivated by patient care needs." 295 NLRB at 395 (citing Beverly Manor Convalescent Centers, 275 NLRB 943, 944-47 (1985)) (emphasis added). Here, Mr. Pendleton's own testimony clearly indicates that the assignment of Mr. Gupton was a personnel decision based upon the need to "fairly" treat the Louisville employees rather than a decision based upon customer needs. (Tr. 180.) Moreover, the Ohio Masonic Home Board found that the employees in question lacked "authority in the areas traditionally associated with personnel matters" such as approving vacation or sick leave and assigning overtime. 295 NLRB at 395. Unlike the charge nurses in *Ohio Masonic Home*, Mr. Pendleton's own testimony indicates that he approves employees' request for vacation or sick leave and that he determines overtime. (Tr. 175-76, 202-03.) Thus, the cases cited by the Hearing Officer in support of her findings are readily distinguishable.

Based on the foregoing, the Board should find that Mr. Pendleton possesses the supervisory authority to assign employees tasks and to a location through his authority to

²³ The Board's decision in *Providence Hospital* merely cites *Ohio Masonic Home* for the proposition that "work assignments made to equalize employees' work on a rotational or other rational basis are routine assignments" for purposes of considering the independent judgment issue, 320 NLRB at 727, so the foregoing analysis regarding the Hearing Officer's erroneous reliance on these decisions is confined to the *Ohio Masonic Home* decision.

determine and change employee routes and that he uses independent judgment on undertaking these duties.

4. The Hearing Officer's Factual And Legal Findings Regarding Mr. Pendleton's Authority To Assign Tasks To Temporary Employees Are Erroneous

The unrefuted evidence also demonstrates that Mr. Pendleton assigns routes to temporary employees, including documented evidence of written directives from Mr. Pendleton to a temporary employee outlining the tasks to be performed during the workday. (Tr. 37-38, 219-20; ER Ex. 18.) Yet, despite this credited evidence, the Hearing Officer ruled that Mr. Pendleton merely "gives temporary employees handhelds and tells them to 'go out and get as much as you can get done," based upon her misguided reliance on Mr. Pendleton's testimony that the duties of the temporary employees are "predetermined." (P. 16.) A fair reading of Mr. Pendleton's testimony shows that in assigning temporary employees work, Mr. Pendleton actually considers all of the following factors: (a) whether the customer to be serviced is "big"; (b) whether temporaries are going to quit because they receive a difficult assignment; (c) how a "big" customer will be affected by having a temporary service its site; and (d) the capabilities of the temporary employee. (Tr. 218-20.) Mr. Pendleton's own testimony, as confirmed by the documented evidence in Exhibit 18, thus shows that he has the authority to assign temporary employees and uses independent judgment in doing so, and the Board should not follow the Hearing Officer's recommendation on this issue.

5. The Hearing Officer's Factual And Legal Findings Regarding Mr. Pendleton's Authority To Assign Overtime Are Erroneous

The Board has unequivocally ruled that appointing an employee to an overtime period independently satisfies the authority to "assign" under Section 2(11), and the evidence is clear that Mr. Pendleton is *solely* responsible for the assignment of overtime at the Louisville facility. *See Oakwood Healthcare*, 348 NLRB at 689; *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006)

(recognizing that where a lead person prepares a posted work schedule and appoints employees to shifts or "any overtime periods," the lead person carries out the responsibilities necessary to meet the statutory definition of "assign").²⁴ Mr. Pendleton's own testimony demonstrates that he has the authority to schedule overtime, as he testified that he has never needed prior approval in scheduling overtime, and if he "wanted to work — 60, 70 hours a week, [he] could." (Tr. 175-76.)²⁵

Highlighting both Mr. Pendleton's authority and independent judgment in determining overtime, the undisputed evidence shows that Mr. Schunder recently asked Mr. Pendleton if Recall needed to hire another person at the facility to address a significant increase in the amount of overtime work by the Louisville employees, and Mr. Pendleton responded that "no, they wanted the overtime." (Tr. 30-31, 196).²⁶ Moreover, the undisputed evidence demonstrates that the Company followed Mr. Pendleton's recommendation without changing the staffing levels until he subsequently determined that the employees no longer wanted so much overtime and then requested additional staffing. (Tr. 30-31, 175-76, 196-98.)

Mr. Pendleton also utilizes substantial independent judgment as part of his responsibility for managing and allocating the amount of overtime worked at the facility. (Tr. 32.) Thus, Mr. Pendleton determines when overtime work is necessary, who performs overtime and how much, without obtaining prior approval from Mr. Schunder. (Tr. 30, 32, 84-85; ER Ex. 14.)

²⁴ Mr. Pendleton has the power to require the employees to abide by his determinations concerning the driver schedule and overtime (Tr. 29-30, 36).

The Hearing Officer found that Mr. Pendleton is not a supervisor on the basis that he does not have the power to require employees to take overtime. She based this finding on Mr. Pendleton's self-serving statement that he did not have this ability and her assertion that there is *no evidence* that Mr. Pendleton can require employees to work overtime. (P. 18.) This statement that no evidence exists on the matter is clearly erroneous, as Mr. Schunder testified that Mr. Pendleton determines when overtime work is necessary, who performs overtime and how much, without Mr. Schunder's prior approval. (Tr. 30, 32, 84-85; Ex. 14.) Indeed, Mr. Pendleton confirmed this testimony, testifying that he has *never* had to seek Mr. Schunder's prior approval before scheduling overtime. (Tr. 175-76.) The mere fact that Mr. Pendleton had not encountered an employee refusal to perform overtime does not undermine this strong evidence of supervisory authority.

²⁶ Ultimately, according to Mr. Pendleton, Recall hired Mr. Shoop after he later complained about the amount of overtime he and the other employees were working. (Tr. 196-98.) Thus, Mr. Pendleton's own testimony demonstrates that he also effectively recommends and determines the hiring needs of the facility.

Moreover, the unrebutted evidence demonstrates that Mr. Pendleton also determines when the Company hires new employees at the facility to help the existing staff manage the overtime. Thus, Mr. Pendleton testified that Mr. Schunder asked him if Recall needed to hire another person at the facility to address an increase in overtime work by the Louisville employees, and he responded that he and the other employees preferred to work the overtime rather than hire another individual. (Tr. 196-97.) Mr. Schunder followed this recommendation and did not pursue the hiring of any one at that time. (Tr. 31.) Mr. Pendleton also conceded that once the employees later became "fed up" with working so many overtime hours, he told Mr. Schunder he wanted to add staff, and Mr. Shoop was thereafter hired based on Mr. Pendleton's recommendation to add staff. (Tr. 196-98.) The evidence is clear, therefore, that Mr. Pendleton has the authority to assign employees overtime using independent judgment.

D. <u>The Hearing Officer's Finding That Mr. Pendleton Does Not Have The</u> Authority To Effectively Recommend Hiring Is Erroneous

The Hearing Officer found that Mr. Pendleton does not have the authority to effectively recommend the hiring of employees at the Louisville facility, citing caselaw for the proposition that in order to possess the authority to effectively recommend hiring, an employee must do more than merely screen applicants or advise management about an applicant's work experience. (P. 21-22.) In so ruling, the Hearing Officer ignored the credited evidence. Mr. Schunder's credited testimony is that Mr. Pendleton recently interviewed two Louisville applicants for the Louisville position, and "Andy chose the second driver over the first and, therefore, we extended the offer to the second driver." (Tr. 112-13) (emphasis added.) Thus, the Hearing Officer's finding that Mr. Pendleton merely screens applicants and advises management about an

applicant's work experience and therefore does not have the authority to effectively recommend hire is completely refuted by the facts.²⁷

The case at hand is on point with the Board's decision finding that the managers in question were statutory supervisors based upon their authority to effectively recommend hiring in *Fred Meyer Alaska, Inc.*, 334 NLRB 646 (2001). In this decision, the Board ruled that an employee who "participated in several interviews and has made specific recommendations that have been followed" effectively recommended hiring. *Id.* at 649. Similarly, Mr. Pendleton participated in multiple interviews, and Recall extended an offer to a candidate based on Mr. Pendleton's recommendation. Thus, based on Board precedent, Mr. Pendleton has the authority to effectively recommend hiring. *See also Donaldson Brothers Ready Mix*, 341 NLRB 958, 962-63 (2004) (finding authority to effectively recommend hiring where putative supervisor recommended two employees for hire after interviewing them and putative supervisor's boss approved these recommendations); *Venture Industries*, 327 NLRB 918, 919-20 (1999) (finding authority to effectively recommend hiring where putative supervisors interview applicants and make recommendations to their department managers as to which applicants should be selected, and such recommendations are followed 80 to 90 percent of the time).

Moreover, in addition to interviewing and effectively selecting employees for hire, Mr. Pendleton also has the authority to recommend staffing levels. Mr. Pendleton testified that Mr. Schunder asked him if Recall needed to hire another person at the facility to address an increase in overtime work by the Louisville employees, and he responded that he and the other

²⁷ The Hearing Officer's discussion of the hiring issue does not address the issue of independent judgment. The totality of independent discretion given to Mr. Pendleton demonstrates that he exercises independent judgment, especially in light of Mr. Schunder's credited testimony that Mr. Pendleton had the "deciding vote" in determining which employee to hire and the testimony that Mr. Schunder followed Mr. Pendleton's staffing recommendations. (Tr. 31, 112, 196-98.)

employees preferred to work the overtime rather than hire another individual. (Tr. 196-97.)²⁸ Mr. Schunder followed this recommendation and did not pursue the hiring of any one at that time. Mr. Pendleton also conceded that once the employees later became "fed up" with working so many overtime hours, he told Mr. Schunder he wanted to add staff, and Mr. Shoop was thereafter hired based on Mr. Pendleton's recommendation to add staff.²⁹ (Tr. 196-98.) Thus, Mr. Pendleton's own testimony indicates that he exercises also the authority, using independent judgment, to effectively recommend hire.

E. <u>The Hearing Officer's Finding That Mr. Pendleton Does Not Responsibly Direct The Louisville Employees Is Erroneous</u>

1. Legal Standard

Under Board law, an individual has supervisory authority to responsibly direct an employee when the individual decides "what job shall be undertaken next or who shall do it," provided that the direction is both "responsible"... and carried out with independent judgment." *Oakwood Healthcare*, 348 NLRB at 691. Such direction is "responsible" if the employer delegated to the putative supervisor the authority to direct the work and take corrective action, if necessary, and if the putative supervisor is "accountable for the performance of the tasks by the other, such that some adverse consequences may befall the one providing the oversight if the tasks performed by the employee are not performed properly." Accountability "requires only a *prospect* of consequences." *Croft Metals*, 348 NLRB 717, 731 (2006). Therefore, in order for Mr. Pendleton to "responsibly direct" the Louisville employees, Mr. Pendleton must direct the employees and be accountable for his direction of the employees. *See Golden Crest Healthcare Center*, 348 NLRB 727, 730 (2006).

²⁸ Mr. Schunder corroborated Mr. Pendleton's testimony, testifying that when he asked him if the Company needed to consider hiring another person to address the large amounts of overtime the employees were working, and Mr. Pendleton's "response was no, that they wanted the overtime." (Tr. 31.)

²⁹ The Hearing Officer attempted to discount this evidence by stating that it took 2-3 months for the hiring of Mr. Shoop to take place. This delay, however, was unexplained and does not undermine or refute that staffing levels were increased based on Mr. Pendleton's recommendation.

2. The Hearing Officer Correctly Assumed That Mr. Pendleton Directs The Louisville Employees Using Independent Judgment

The Hearing Officer's report apparently assumed that Mr. Pendleton directs the other Louisville employees using independent judgment, as her analysis is confined to whether Mr. Pendleton is held accountable for such direction. The Hearing Officer's assumptions in this regard should not be disturbed, as the testimony from both Mr. Pendleton and Mr. Schunder and the uncontroverted documentary evidence establish that Mr. Pendleton, as having "ownership of the operation," directs the other Louisville employees using independent judgment by independently determining and changing the routes that the Louisville employees drive, determining when their workday begins and ends, assigning routes, determining when overtime work is necessary, directing temporary workers, cancelling workdays at the Louisville facility due to inclement weather or other conditions, addressing employees' requests for time off, ensuring that the Louisville employees have received and have documented taking the required training, addressing, investigating and reporting employee injuries or work restrictions, investigating employee accidents, administering drug tests, ensuring that medically-restricted employees are working "light-duty" and calling and directing employees to investigate security incidents when necessary, all of which require a consideration of multiple factors rising above the routine and clerical. (Tr. 19, 25-27, 30, 32-33, 34, 36, 38, 39-45, 50-53, 58-59, 67-69, 70-71, 78-85, 126, 147-48, 150-52, 174, 182, 195, 206-07, 224-25, 230-33; ER Exs. 3-11, 14-20.) Indeed, in Mr. Pendleton's own reluctant words regarding his supervisory authority, "I oversee these guys. There you go." (Tr. 203-04.) 30

³⁰ Although Mr. Pendleton asserted that he does not consider himself to be a supervisor (Tr. 203), he admitted to referring to himself as a "Supervisor" on a document he filed on behalf of Recall with the Indiana State Police. (Tr. 204-05; ER Ex. 15.)

3. The Hearing Officer Erred In Finding That Mr. Pendleton Is Not Held Accountable In His Direction Of The Louisville Employees

The Hearing Officer found that Recall failed to show there is a prospect of adverse consequences to Mr. Pendleton if he fails to responsibly direct the Louisville employees. (P. 19.) This finding is directly refuted by Mr. Schunder's credited testimony. Mr. Schunder testified that he formally disciplined a Team Lead serving in the same role as Mr. Pendleton at Recall's Cleveland facility for failing to properly oversee the operations, and Mr. Pendleton is held similarly accountable by Mr. Schunder for the performance of the Louisville facility. (Tr. 22-23.)³¹ The Hearing Officer inexplicably drew an adverse inference that because the Company did not present Mr. Pendleton's performance evaluations into the record, Mr. Schunder's testimony is not credible on this issue. (P. 19-20.) The Hearing Officer's reasoning misses the mark. Under the Board's standards, Recall does not need to prove that Mr. Pendleton's performance evaluations contain discipline or reprimand for a failure to properly oversee the operations in order to show that Mr. Pendleton is held accountable for the operations of the facility.³² Rather, in order to show accountability, Recall must only show "a prospect of consequences." Croft Metals, 348 NLRB at 731. Mr. Schunder's credited testimony that he formally disciplined an employee serving in the same role as Mr. Pendleton, and that he would hold Mr. Pendleton similarly accountable, demonstrates that there is a prospect of adverse consequences to Mr. Pendleton if he fails to properly oversee the operations.³³ The Hearing Officer's refusal to recognize Mr. Schunder's credited testimony operates to render the Board's ruling in *Croft Metals* void in a situation such as this where a putative supervisor has not actually

³¹ In addition, Mr. Schunder testified that Mr. Pendleton is responsible for ensuring that the Louisville employees comply with Company policies and the tasks he assigns to them and is accountable to Mr. Schunder if the employees fail to comply with the policies and the tasks he assigns. (Tr. 63-64.)

Indeed, Ms. Schunder testified that the Cleveland Team Lead received a formal write-up, not that his performance evaluation was necessarily affected. (Tr. 23.)

³³ The same evidence was cited by the Regional Director in its decision finding that Mr. Ritchie exercises the authority to, among other responsibilities, responsibly direct employees in Lexington in Case 9-RC-18285.

been but could be disciplined for a failure to responsibly direct his employees and therefore does not have documentation showing that he has been evaluated for such a failure.

4. The Hearing Officer's Finding That Mr. Pendleton Does Not Have The Authority To Take Corrective Action When Needed Is Erroneous

The Hearing Officer also claimed that no evidence was presented that Recall delegated to Mr. Pendleton the authority to take corrective action when needed, P. 19, but this finding is again refuted by the facts. Mr. Pendleton's credited testimony is that upon complaining about Mr. Gupton's performance, he was informed that if the Company wanted to "do something" about (*i.e.*, discipline) Mr. Gupton, *he* needed to document his concerns with Mr. Gupton's performance. (Tr. 208.) Mr. Pendleton's credited testimony therefore indicates that he has the authority to take corrective action with the Louisville employees for a failure to perform by documenting their performance, which would be used to discipline the employees. Mr. Pendleton admitted to understanding he had this authority following this conversation by taking detailed notes regarding Mr. Gupton's performance. (Tr. 208-14; ER Ex. 16.)

Mr. Pendleton also testified about an incident in which he prepared a disciplinary write-up of Mr. Gupton for performance issues. Had Mr. Pendleton issued the disciplinary write-up to Mr. Gupton, it would have increased the likelihood of greater punishment for other incidents in the future. (Tr. 65-66.) Because Mr. Gupton argued with him, Mr. Pendleton became concerned that Mr. Gupton would "throw [the write-up] away and walk away from it," and therefore Mr. Pendleton did not issue the warning. (Tr. 191-92, 209-14.) Mr. Pendleton's testimony is corroborated by Mr. Schunder, who testified that Mr. Pendleton told him he was going to issue a warning to Mr. Gupton, but later said he threw the warning away after Mr. Gupton refused to sign it. (Tr. 65-66, 108-09, 144.) Thus, contrary to the Hearing Officer's assertion, the evidence is clear from Mr. Pendleton's own credited testimony that he has the authority to take "corrective action" and to also make the decision *not* to discipline an employee. (Tr. 65-66.)

The Hearing Officer seemingly equated the effectiveness of Mr. Pendleton's ability to take corrective action regarding Mr. Gupton's performance with the authority to take corrective action. The Board has continuous and unequivocally stated, however, that only the *authority* to take supervisory action is needed, not its actual effective exercise. See Sheraton Universal Hotel, 350 NLRB 1114, 1118 (2007) ("Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise."); Mountaineer Park, Inc., 343 NLRB 1473, 1474 (2004) ("Significantly, it is not required that the individual have exercised any of the powers enumerated in the statute; rather, it is the existence of the power that determines whether the individual is a supervisor."); Fred Meyer Alaska, Inc., 334 NLRB 646, 649 n. 8 (2001) (citing *Pepsi-Cola Co.*, 327 NLRB 1062 (1999)) ("The rule clearly established in Board precedent that possession of authority consistent with any of the indicia of Sec. 2(11), is sufficient to establish supervisory status, even if this authority has not yet been exercised."). Here, although Mr. Pendleton admitted that he was ineffective in taking corrective action, he testified that he did have the authority to issue such corrective action, which satisfies the statutory standard.

Therefore, based on the evidence, Recall has clearly established that Mr. Pendleton directs the Louisville employees using independent judgment, with the prospect of adverse consequences, and that he has the authority and discretion to take corrective action as needed.

F. The Hearing Officer's Finding That Mr. Pendleton Does Not Have The Authority To Discipline Or Effectively Recommend Discipline Is Erroneous

The Hearing Officer found that Mr. Pendleton does not have the authority to discipline the Louisville employees because there was no evidence presented that Mr. Pendleton has ever independently disciplined an employee or effectively recommended that an employee be disciplined, other than an oral warning, and Mr. Pendleton's authority was therefore only limited to issuing oral warnings. (P. 21.) The Hearing Officer ignored Mr. Pendleton's own credited

testimony that he told Mr. Gupton to come meet him about his attendance issues and presented him with a disciplinary write-up, but that he stopped with the discipline because "if it would have went any further, me and him would have went to blows." (Tr. 191-93.) Thus, although the Hearing Officer claims that Mr. Pendleton could only issue discipline orally, Mr. Pendleton's own testimony about the write-up to Mr. Gupton indicates that he believes he can issue written discipline.³⁴ Again, contrary to the Board's mandate, the Hearing Officer equated Mr. Pendleton's *authority* to issue discipline with his *effectiveness* in issuing discipline.

The Hearing Officer also ignores the discretion which Mr. Pendleton exercised in *not* issuing discipline. The authority to issue discipline includes the discretion *not to* issue discipline when in the exercise of supervisory judgment, that is the better course of action. Here, the undisputed evidence shows that Mr. Pendleton tracked and documented Mr. Gupton's performance, counseled with him regarding his performance, prepared a written warning to address his performance problems and then decided *on his own* not to deliver the written warning because he wanted to avoid conflict with Mr. Gupton. Thus, although Mr. Pendleton's testimony indicates that he may not be an effective supervisor in issuing discipline, his testimony clearly indicates that he believes he has the authority to issue discipline and decide when not to issue discipline. *See Venture Industries*, 327 NLRB 918, 919-20 (1999) (finding supervisory authority to discipline employees where putative supervisors have authority to issue oral or written reprimands to employees concerning performance and attendance issues as part of progressive disciplinary system).

_

The credited testimony of Mr. Schunder establishes that such a warning increases the probability of more severe discipline on the next occurrence of performance or disciplinary issues. (Tr. 66.)

³⁵ Although his own testimony clearly indicates that he uses independent judgment in deciding how, when and when not to issue discipline, the Board has ruled that a supervisor's authority to effectively recommend discipline using independent judgment is also evidenced by a supervisor when he has the "authority to decide whether to handle potential discipline issues [himself] informally instead of bringing them to [upper management's] attention. *Progressive Transportation Services*, 340 NLRB 1044, 1046 (2003).

In support of her finding, the Hearing Officer found that in order for Mr. Pendleton to possess the authority to discipline employees, "the evidence must establish that the disputed supervisor's participation in the disciplinary procedure leads to a personnel action without independent review or investigation by other managerial or supervisory personnel." (quoting Franklin Home Health Agency, 337 NLRB 826, 830 (2002), citing Beverly Health & Rehabilitation Services, Inc., 335 NLRB 635 (2001)). Mr. Pendleton's own testimony establishes this "required element," as he stated that upon observing Mr. Gupton show up late to work, he told him to visit his office with the plan of writing him up. (Tr. 192.) As previously noted, Mr. Schunder's credited testimony establishes that this warning would increase the likelihood of more severe discipline on the next occurrence of performance or disciplinary issues. (Tr. 66.) Thus, Mr. Pendleton's own testimony demonstrates that he has participated in the disciplinary procedure without independent review from Mr. Schunder or any other managerial or supervisory personnel.

G. The Hearing Officer's Finding That Mr. Pendleton Does Not Have The Authority To Suspend Is Erroneous

The Hearing Officer incorrectly found that Mr. Pendleton does not have the authority to suspend employees, stating that there was no evidence presented on this issue. (P. 21.) The Hearing Officer's statement that no evidence was presented on this issue ignores undisputed record evidence, as Mr. Schunder's unequivocal and credited testimony is that although Mr. Pendleton has not had to suspend an employee at the Louisville facility, on at least one occasion, a Team Lead at another facility in Mr. Schunder's region has suspended an employee on the spot without Mr. Schunder's prior approval for possessing a negative attitude, and Mr. Pendleton has the same authority. (Tr. 66-67.) Once again, the Hearing Officer erroneously equated the act of suspending an employee with the authority to suspend an employee by finding against Recall on the basis that Mr. Pendleton has not actually suspended an employee rather

than analyzing whether he has the authority to suspend an employee. Mr. Schunder's testimony also demonstrates that Mr. Pendleton has the authority to suspend using independent judgment in that Mr. Pendleton has the authority to suspend an employee on the spot for reasons within his discretion without Mr. Schunder's prior approval. (*Id.*)

In *Venture Industries*, 327 NLRB 918, 919-20 (1999), the Board found that the putative supervisors had the authority to suspend based upon their authority to recommend suspension. In that case, the evidence indicated that the putative supervisors who recommended suspension met with the human resources director and the department manager to recommend suspension, and these recommendations were followed only about 75 percent of the time. *Id.* at 919. Here, the evidence of supervisory authority is much stronger, as Mr. Pendleton does not have to meet with anyone before suspending an employee and is thus able to suspend an employee anytime he believes the employee should be reprimanded. Thus, under established Board precedent, Mr. Pendleton possesses the authority to suspend.

H. The Hearing Officer's Finding That Mr. Pendleton Does Not Have The Authority To Effectively Recommend Rewards Is Erroneous

The Hearing Officer found that despite clear evidence that Mr. Pendleton participates in the Louisville employee evaluation process, his involvement amounts to primarily "a reporting function" regarding the performance of his drivers and that he therefore does not have the authority to reward of effectively recommend rewards for employees, citing *Loparex LLC*, 353 NLRB No. 126, slip op. at 15. (P. 20). The Hearing Officer's reliance on *Loparex* is misplaced. In that case, the Board ruled that the putative supervisors did not have the authority to effectively recommend rewards because their observations regarding employee performance contained no recommendation regarding employee rewards and that their observations were not given weight or correlated with actual rewards such as raises. *Id.* In the case at hand, however, Mr. Pendleton testified that he gives Mr. Schunder a numerical rating of his employees as part of the

Company's annual performance review process. (Tr. 198-200.)³⁶ Mr. Schunder's uncontroverted testimony is that he "absolutely" takes Mr. Pendleton's recommendations and assessments into consideration by filling out the annual performance evaluations based upon and contemporaneously with Mr. Pendleton's feedback. (Tr. 71-73.) Moreover, Mr. Schunder testified that an employee's pay rate depends upon the numerical ratings he receives in these evaluations.³⁷ (*Id.*) Thus, the evidence is clear that unlike the putative supervisors in *Loparex*, who served as primarily in a reporting role and whose observations were not given weight in the raise process, Mr. Pendleton effectively recommends rewards by providing the actual numerical ratings that determine the employees' pay raises.³⁸ *See, e.g., CTI Alaska, Inc.*, 326 NLRB 1121 n. 3 (1998) (ruling that putative supervisor had supervisory authority where Company used opinions he shared regarding employees' performance in making personnel decisions).³⁹

I. <u>Secondary Indicia Further Supports Recall's Position That Mr. Pendleton Is A Supervisor Under the Act</u>

As the Hearing Officer correctly stated, although secondary indicia regarding supervisory status, standing alone, without primary indicia, is insufficient to prove supervisory authority,

³⁶ Mr. Pendleton's testimony that he gives Mr. Schunder his "input" and "opinions" demonstrates that he utilizes independent judgment in evaluating the employees. (Tr. 199.)

³⁷ The Hearing Officer apparently found significant Mr. Schunder's testimony that no employee received a pay increase last year, despite the ratings system. (P. 20.) Mr. Schunder's testimony that no employee received a pay increase across the board for a single year (during the worst economic crisis since the Great Depression) should not dilute his and Mr. Pendleton's testimony that every other year, employees have received pay increases. (Tr. 157, 198.)

³⁸ Recall also excepts to the Hearing Officer's rejection of Recall's implied argument that Mr. Pendleton's ability to assign routes functions as a reward of other employees under the Company's recent Pay for Performance plan on the basis that neither Mr. Pendleton nor the other SSRs could determine how the program worked in practice. This evidence is refuted by the testimony of the Louisville employees. Thus, Mr. Pendleton testified that under Pay for Performance, driver pay is affected by the type of truck, the number of bins serviced, the type of bins serviced and the number of miles on a route a driver is assigned to. (Tr. 187-88.) In addition, Mr. Gupton testified that his earnings would depend on the route he was assigned for the day (Tr. 310-11), and Mr. Shoop testified that under Pay for Performance, an employee has a better opportunity to earn more money on certain routes than others. (Tr. 277.) Mr. Pendleton concurred in their assessments of the program, stating that certain routes are worse than other routes, and some routes "just [make] more money," and that assignments do affect pay. (Tr. 177-78, 185.) Regardless, the evidence is clear that Mr. Pendleton participates in the employee evaluation process and that his recommendations impact employee pay raises.

³⁹ Although *CTI Alaska* was decided in the context of a putative supervisor effectively recommending layoff and transfer rather than rewards, the factual scenarios are similar in that the upper management in *CTI Alaska* also took the putative supervisors' opinions regarding employees into consideration in applying its actions. 326 NLRB at 1124-25.

there are several secondary indicia buttressing Recall's position which the Hearing Officer completely ignored. (Tr. 22.)⁴⁰ As part of his promotion to Louisville Team Lead, Mr. Pendleton received a pay increase of dollar and half per hour and he continues to receive a higher pay rate than the other Louisville employees. (Tr. 18; ER Ex. 2.) *See Mountaineer Park*, 343 NLRB 1473, 1476 (2004) (finding significant that putative supervisor earns an hourly wage this is 50 cents to \$1 higher than non-supervisory employees); *Progressive Transportation Services*, 340 NLRB at 1047 (finding significant that putative supervisor received a \$2 per hour rise upon promotion).

Mr. Pendleton plays an important role at the Louisville facility and thereby worked with Mr. Schunder to identify a new facility in the Louisville area to relocate to about a year ago. (Tr. 60.) Mr. Pendleton also receives the following privileges assigned to him unlike the other Louisville employees: a desk, a credenza, a computer and business cards. (Tr. 74-75.) *See Progressive Transportation Services*, 340 NLRB 1044, 1047 (2003) (finding significant that putative supervisor was only dispatcher to have business cards).

In addition, Mr. Pendleton has attended managers meetings, including a recent meeting held by Regional Operations Manager Dave Albert in which no non-supervisory personnel were invited. (Tr. 76-77.)⁴¹ Comporting with his management responsibilities, Mr. Pendleton receives emails concerning Recall matters directed to only managers via the North American Operations Managers Email List and has email access on Recall's email system. (Tr. 39, 75-76; ER Ex. 3.) *See Sheraton Universal Hotel*, 350 NLRB 1114, 1118 (2007) (finding significant that putative supervisor attended management meetings and had access to an email account only given to members of management).

⁴⁰ The Hearing Officer's bare analysis of Recall's argument regarding the secondary indicia apparently credits Recall's argument that Mr. Pendleton is the only managerial employee at the Louisville facility. (Tr. 19.)

⁴¹ Mr. Schunder testified that Mr. Pendleton attended a training for team leads at a Recall facility near Washington, D.C. and has received other trainings on the Company's "proprietary systems." (Tr. 101-02.)

Mr. Pendleton has password-protected access to the Company's master Granger account and website, unlike the other Louisville employees, which he uses to order equipment and supplies for the operations and facility. (Tr. 60-61.) Mr. Pendleton is responsible for billing certain customers and, when necessary, must make manual billing adjustments outside the normal Recall billing system. (Tr. 61-62.) Mr. Pendleton also is responsible for auditor inspections at the facility and several other necessary reports. (Tr. 62-63, 81-82; ER Ex. 14.)

Thus, although it is not necessary, Recall has produced substantial secondary indicia supporting its position that Mr. Pendleton exercises supervisory authority under the Act.

VI. CONCLUSION

In the Hearing Officer's Report, she improperly isolates and attempts to explain away the numerous examples of Mr. Pendleton's supervisory status rather than simply accepting the conclusion dictated by the overwhelming weight of the evidence -- Mr. Pendleton functions as a supervisor within the meaning of the Act. Specifically, among other things, the uncontroverted evidence shows:

- Mr. Pendleton exercises complete discretion over overtime assignments without *any* prior approval (Tr. 175-76), which establishes supervisory status.
- Mr. Pendleton effectively recommends the staffing levels and hiring at the facility by first recommending that the employees work overtime rather than hire additional staff and then recommending the hiring of an additional employee when the employees grew tired of working overtime. (Tr. 31, 196-98.) In both instances, Mr. Pendleton's recommendations were implemented. (*Id.*) Moreover, Mr. Pendleton interviewed and made the hiring recommendation as between the final two candidates for a job at Louisville. (Tr. 112-13.) Once again, this recommendation was followed and Mr. Pendleton's preferred candidate was

- offered the job. (Tr. 113.) *All* of this evidence is uncontroverted and establishes at a minimum that Mr. Pendleton has the authority to effectively recommend hiring as a supervisor under Section 2(11) of the Act.
- Mr. Pendleton provides numerical performance ratings of the other Louisville employees as part of the formal performance evaluation process and these recommendations were adopted by Operations Manager Mr. Schunder. (Tr. 71-73; 198-200). Performance ratings directly impact employee compensation and status at Recall. (Tr. 71-73, 154-57.) This uncontroverted evidence establishes that he effectively recommends performance ratings and establishes supervisory status.
- For months, Mr. Pendleton tracked and documented the attendance and performance of Louisville employee Fred Gupton. (Tr. 209-212; ER Ex. 16.) Mr. Pendleton counseled Mr. Gupton about his attendance and at one point decided to issue a written warning to Mr. Gupton. (Tr. 191-92.) Specifically, Mr. Pendleton testified that he told Mr. Gupton to "come on in here, we need to talk about your attendance" and that when Mr. Gupton asked, "oh, what, you're going to write me up over this," to which Mr. Pendleton replied, "Fred, I don't know what else to do." (Tr. 192.) Although Mr. Pendleton has ultimately decided not to issue this written warning, the uncontroverted evidence shows that Mr. Pendleton has the *authority* to do so. This evidence was confirmed by Mr. Schunder and corroborated by the undisputed fact that another Team Lead in the same role as Mr. Pendleton has issued discipline to employees. (Tr. 64-67, 144.) The issue under the Act is whether Mr. Pendleton has supervisory authority

- -- not whether Mr. Pendleton has effectively exercised that authority. Again, the undisputed record supports a finding of supervisory status.
- Mr. Pendleton has the authority to suspend an employee on his own without Mr. Schunder's prior approval, and another Team Lead has exercised this authority. (Tr. 66-67.)
- The record evidence contains numerous examples of Mr. Pendleton making work assignments and responsibly directing the work of the Louisville employees. (See Sec. V.C. and V.E.) Although the Hearing Officer goes to great lengths to isolate and minimize the evidence, her findings are refuted by the overwhelming weight of the evidence which shows that Mr. Pendleton independently makes route changes and work assignments on a frequent basis and has to consider a number of factors in making such logistics decisions to best serve customers and create efficient routes. (See Sec. V.C.) When the cumulative evidence concerning such matters is properly considered rather than artificially segregated, Mr. Pendleton's supervisory authority to assign work and responsibly direct cannot be seriously questioned.

For the foregoing reasons, Recall respectfully requests that the Board declare to follow the Hearing Officer's Report On Recall's Objections And Recommendation To The Board and rule that Mr. Pendleton constitutes a "supervisor" under Section 2(11) of the Act and therefore remand the case to the Hearing Officer so that it can be determined whether Mr. Pendleton's prounion conduct had a material impact on the election results such that the results of the election should be set aside and a new election ordered.

Respectfully submitted, this 6th day of July, 2010.

/s/ Kurt A. Powell

Kurt A. Powell HUNTON & WILLIAMS LLP 600 Peachtree Street, N.E. Bank of America Plaza, Suite 4100 Atlanta, GA 30308-2216 (404) 888-4000 Telephone (404) 888-4190 Facsimile kpowell@hunton.com

Counsel for Recall Secure Destruction Services, Inc.

CERTIFICATE OF FILING

This is to certify that on July 6, 2010, I e-filed the foregoing document with the Executive Secretary, National Labor Relations Board, on the Agency's website at www.nlrb.gov. I also certify that I served a copy of the foregoing via email as indicated, and by depositing a copy of same in the U.S. Mail, postage prepaid, addressed to the following:

Elisabeth J. Macaroni, Hearing Officer Region 9, National Labor Relations Board 3003 John Weld Peck Federal Building 550 Main Street Cincinnati, Ohio 45202-3271 (elisabeth.macaroni@nlrb.gov)

Gary W. Muffley, Regional Director Region 9, National Labor Relations Board 3003 John Weld Peck Federal Building 550 Main Street Cincinnati, Ohio 45202-3271

Mr. Harold Embry
Director of Strategic Program
United Food and Commercial Workers Union
Local 227
3330 Pinecroft Drive
Louisville, KY 40219-2292
(embryufcw227@yahoo.com)

Mr. J. Chris Sanders
Executive Assistant to the President and General
Counsel
UFCW Local 227
3330 Pinecroft Drive
Louisville, KY 40219-2292
(csandersufcw227@yahoo.com)

Mr. Kevin Evans
Assistant to the President/Organizer
General Drivers, Warehousemen and Helpers,
Local Union No. 89
3813 Taylor Boulevard
Louisville, Kentucky 40215
(kevans@teamsters89.com)

Mr. Robert M. Colone P.O. Box 272 Sellersburg, IN 47172

/s/ Kurt A. Powell

Kurt A. Powell HUNTON & WILLIAMS LLP 600 Peachtree Street, N.E. Bank of America Plaza, Suite 4100 Atlanta, GA 30308-2216 (404) 888-4000 Telephone (404) 888-4190 Facsimile kpowell@hunton.com

Counsel for Recall Secure Destruction Services, Inc.